



November 19, 1999

Ms. Susan Combs  
Commissioner  
Texas Department of Agriculture  
P. O. Box 12847  
Austin, Texas 78711

OR99-3335

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130927.

The Department of Agriculture (the "department") received a request for a report made in connection with an investigation of possible violations of state or federal pesticide laws. You seek to withhold some of the information responsive to the request under section 552.103 of the Government Code.

Section 552.103(a) of the Government Code, known as the litigation exception, excepts from required public disclosure information

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party[.]

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

Here, you advise that all of the information at issue was generated by the department with an eye to its bringing an enforcement action pursuant to its duties under the Agriculture Code

and federal law. Such enforcement action would be a contested proceeding under chapter 2001 of the Government Code, the Administrative Procedure Act. Based on your representations, we conclude that the department reasonably anticipates litigation to which the information at issue relates. Accordingly, except as noted below, you may withhold the information in question under section 552.103.

Please note that, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103. Similarly, section 552.103 does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/LJP

Ref: ID# 130927

Encl. Submitted documents

cc: Mr. G. Robert Martin  
Harper-Kennedy & Associates  
P.O. Box 64308  
Lubbock, Texas 79464  
(w/o enclosures)